

Case No. S168078

IN THE
Supreme Court of the State of California

SUPREME COURT
FILED

CITY AND COUNTY OF SAN FRANCISCO et al.,

DEC 19 2008

Petitioners,

Frederick K. Ohnrich Clerk

Deputy

MARK B. HORTON, as State Registrar of Vital Statistics, etc., et al.,

Respondents;

DENNIS HOLLINGSWORTH et al.,

Interveners.

INTERVENERS' OPPOSITION BRIEF IN RESPONSE TO
SECOND AMENDED PETITION FOR WRIT OF MANDATE
OF CITY AND COUNTY OF SAN FRANCISCO, ET AL.

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Petitioners,

v.

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PRELIMINARY STATEMENT

The arguments contained in the three petitions challenging Proposition 8 are similar in all material respects. Accordingly, Interveners – the Official Proponents of Proposition 8 and the official campaign committee in favor of Proposition 8 (hereafter collectively “Interveners”) – hereby incorporate by reference “Interveners’ Opposition Brief” filed in *Karen L. Strauss et al. v. Mark B. Horton et al.*, case no. S168047, as their principal response to the petition in this case.¹ The additional arguments contained herein address specific issues and arguments raised by the petitioners in this case.

ARGUMENT

This brief addresses two issues. First, petitioners City and County of San Francisco and the other municipalities (hereafter “the municipal petitioners” or “petitioners”) lack standing. The municipal petitioners have at most an ideological interest in this challenge, but that does not suffice. What matters is that they lack the beneficial interest required under Code of Civil Procedure section 1086 and other applicable provisions. Municipalities do not have standing to challenge state laws they claim violate the rights of their residents, or to argue that laws which their officials believe to be unconstitutional present them with inconsistent legal obligations. As this Court taught in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1099 (hereafter *Lockyer*), such challenges are properly brought by municipal residents whose legally protected interests are directly at stake.

¹ Interveners also adopt by reference and will refer herein to the Request for Judicial Notice in Support of Interveners’ Opposition Brief, filed in the Strauss proceeding (hereafter “Interveners’ RJN”).

Second, the municipal petitioners argue that the people's reserved power to amend the California Constitution by initiative does not include the authority to determine the scope of equal protection rights. They contend that equal protection is an original foundational principle of the Constitution and that the super-majority requirements for revising the Constitution were established to protect unpopular groups. (See Second Amended Petition for Writ of Mandate, etc. of Petitioners City and County of San Francisco et al., at pp. 20-22 (hereafter "CCSF Petn.")). None of these assertions has any basis in law or history. This Court's jurisprudence nowhere hints that equal protection rights are exempt from the people's initiative power. Indeed, the current 1879 Constitution was by no means dedicated to anything approximating the vision of equality petitioners describe. For nearly a century, the Constitution did not even contain an equal protection clause. That omission was not cured until passage of a constitutional amendment in 1974. Prior to 1974, Californians relied primarily on federal equal protection guarantees, which this Court robustly enforced.

I. THE MUNICIPAL PETITIONERS LACK STANDING.

Standing is an essential requirement for a party to a lawsuit and may be raised at any time. (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 233.) As this Court has often taught, standing requires that a party have a specific and concrete legal interest in the outcome of the dispute rather than a general ideological interest. They must, in short, have suffered an "injury in fact":

To have standing to seek a writ of mandate, a party must be "beneficially interested" (Code Civ. Proc. § 1086), i.e., have some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. This standard ... is

equivalent to the federal “injury in fact” test, which requires a party to prove by a preponderance of the evidence that it has suffered an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.

(Associated Builders and Contractors, Inc. v. San Francisco Airports Comm’n (1999) 21 Cal.4th 352, 360-61 (internal quotation marks and citation omitted).

The municipal petitioners allege various purported injuries to support standing:

- They face “inconsistent obligations under state law” because they “cannot comply with Proposition 8 without violating the equal protection rights of [their] residents.” (CCSF Petn., at pp. 2-3.)
- If implemented, Proposition 8 would force them “to violate the constitutional rights of [their] residents by denying them marriage licenses.” (*Id.*)
- They “have an interest in protecting the rights of [their] residents and would be harmed if required to act in contravention of the rights of [their] lesbian and gay residents.” (*Id.*)

These allegations fall far short of establishing that the municipal petitioners face an “injury in fact” distinguishing them from all other municipalities in California.² Their ideological interest in this matter – advanced on behalf of a segment of their respective residents – is insufficient.

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² Interveners do not challenge the standing of the individual couples who have joined in this petition with the municipal petitioners.

A. The Municipal Petitioners Do Not Face Inconsistent Obligations.

The municipal petitioners' assertion that they face inconsistent obligations assumes that Proposition 8 violates the equal protection clause of the California Constitution. However, an amendment to the Constitution does not violate the Constitution unless it constitutes an improperly enacted revision. Until this Court makes that determination, the municipal petitioners are legally bound to treat Proposition 8 as a binding constitutional provision. The Court made that clear in its order in the *Strauss* and *Tyler* petitions (see case nos. S168047 and S168066). There, this Court denied the request for an interim stay of Proposition 8. The unambiguous command of Proposition 8 is thus in full effect. It is legally binding upon the state and all its subdivisions. The municipal petitioners thus face no inconsistent obligations under state law. They must obey the law, whether they agree with it or not.

The specific duties of municipal officials with respect to marriage pertain primarily to issuing marriage licenses and record keeping. Issuing or denying a marriage license is a ministerial act. (See *Lockyer, supra*, 33 Cal.4th at p. 1082.) "A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of the legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists." (*Kavanaugh v. West Sonoma County Union High Sch. Dist.* (2003) 29 Cal.4th 911, 916, internal quotation marks omitted.) Local officials do not have independent discretion in performing ministerial acts. Their duty is simply to carry out the tasks prescribed by state law. (See *Lockyer, supra*, 33 Cal.4th at p. 1081-82.) Those laws are presumed constitutional unless and until the judiciary determines otherwise. (*Id.* at p. 1086.) Municipal officials have no authority to speculate about whether a law

might later be found unconstitutional. (*Ibid.* [“The city has not identified any provision in the California Constitution or in the applicable statutes that purports to grant the county clerk or the county recorder (or any other local official) the authority to determine the constitutionality of the statutes each public official has a ministerial duty to enforce.”].)

It follows that the municipal petitioners and their officials do not face liability for performing ministerial acts. In *Lockyer*, this Court stated that local officials “clearly would not have incurred liability under California law simply for following the current marriage statutes and declining to issue marriage licenses or register marriage certificates in contravention of those statutes.” (*Lockyer, supra*, 33 Cal.4th at p. 1097). Likewise, local officials risk no liability for following the dictates of Proposition 8.

B. The Municipal Petitioners Lack Standing to Invoke the Equal Protection Interests of Their Residents.

Nor do the municipal petitioners have standing to invoke the equal protection rights of others. In *Community Television of So. Cal. v. County of Los Angeles* (1975) 44 Cal.App.3d 990, a municipality challenged the constitutionality of a provision of the tax code on equal protection grounds. The court held that “as a political subdivision of the state and not being parties who belong to a class allegedly discriminated against, [the City of Los Angeles] lack[s] the standing to make such a challenge.” (*Id.* at p. 998.)

The municipal petitioners lack standing here for the same reason. They no more have standing to challenge Proposition 8 on behalf of their gay and lesbian residents than they would to intervene and defend Proposition 8 on behalf of those who voted for it.

C. Proposition 8 Should Be Challenged by Those with A Personal Stake in the Outcome.

In *Lockyer*, this Court described what a political subdivision should do when it believes a statute is unconstitutional:

If the local officials charged with the ministerial duty of issuing marriage licenses and registering marriage certificates believed the state's current marriage statutes are unconstitutional and should be tested in court, they could have denied a same-sex couple's request for a marriage license and advised the couple to challenge the denial in superior court. *That* procedure – a lawsuit brought by a couple who has been denied a license under existing statutes – is the procedure apparently utilized in all of the other same-sex marriage cases that have been litigated recently in other states.

(*Lockyer, supra*, 33 Cal.4th at p. 1099, italics in original.)

* * * *

In sum, it is the constitutional duty of a ministerial official to enforce the law unless and until it is declared unconstitutional by the judiciary. The official does not have discretion to do otherwise. Bound by the law, the official has no personal stake in the matter and therefore no standing to challenge the law. The same holds for the municipality that employs that official. The municipal petitioners lack standing in this case. Moreover, in conformity with this Court's teachings in *Lockyer*, several same-sex couples who are impacted directly by Proposition 8 are already petitioners in this proceeding. The municipal petitioners' presence is unnecessary and out of keeping with controlling standing law.

II. PROPOSITION 8 IS A VALID INITIATIVE AMENDMENT.

The municipal petitioners argue that the initiative power does not allow a majority to amend the Constitution to reduce the rights of minority

groups. They also attempt to distinguish decisions from other jurisdictions addressing the revision question. Both arguments are misguided.

A. The Manner In Which The 1911 Initiative Power Was Created Does Not Place Substantive Limitations On The Initiative Process.

The municipal petitioners argue that because the initiative power was itself enacted by amendment rather than revision, it does not authorize initiatives that limit equal protection rights: “[I]f Californians wished to transfer final authority over the equal protection rights of unpopular groups from the judiciary to a bare political majority, they would have had to accomplish this goal by revision rather than amendment.” (CCSF Petn., at pp. 30-31.)

There is no legal or historical foundation for this naked assertion. Never has this Court suggested that the manner in which the Constitution was amended in 1911 places a substantive limitation on the reserved initiative power. On the contrary, as set forth at length in Interveners’ Opposition Brief in *Strauss*, this Court has consistently held that the power of initiative must be liberally construed. (See, e.g., *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241 (hereafter *Brosnahan*).) The only limitation is that an initiative amendment may not constitute a revision under the exacting standards of this Court’s jurisprudence. (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 221.)

That analysis does not turn on whether the proposed amendment was placed on the ballot by citizens through the initiative process or by the Legislature. In other words, there is no constitutional limitation on the power of the people to propose amendments by initiative that does not also apply to the Legislature’s power to propose amendments to the voters by

two-thirds majority vote. The issue is not how the proposed measure is presented to the voters but whether it constitutes a revision or an amendment.

**B. The Equal Protection Clause Was Adopted By
Amendment After the Initiative Power was Created.**

The municipal petitioners argue that the initiative power “cannot possibly be construed as allowing a bare majority of voters to strip unpopular groups of rights previously conferred by the equal protection clause.” (CCSF Petn., at p. 29.) As the municipal petitioners themselves note, however, the equal protection clause of the California Constitution was not adopted until 1974. The equal protection clause was adopted as an amendment, not as a revision.³

Two conclusions follow. First, if the equal protection clause was inserted into the Constitution by amendment, then its scope can be adjusted by amendment as well. Second, the 1974 amendment did not purport to alter or limit the initiative power. Nothing in the text of Proposition 7 (1974) or its ballot materials suggested that adding the equal protection clause might alter the initiative power or limit the people’s ability to expand or contract equal protection rights. (See Assem. Const. Amend. No. 60,

³ The equal protection clause was added to the Constitution by amendment in 1974 by Proposition 7. The Legislature’s resolution that proposed Proposition 7 stated: “Resolved by the Assembly, and Senate concurring, That the Legislature . . . hereby proposes to the people of the State of California that the Constitution of the state *be amended* as follows: . . .” (Assem. Const. Amend. No. 60, Stats. 1974 (1973-1974 Reg. Sess.) res. ch. 90, pp. 3736-3737, italics added; see also Interveners’ RJN at Exh. 8.) In the voters pamphlet, the text of Proposition 7 stated: “This *amendment* . . . expressly *amends* existing sections of the Constitution by *amending* and repealing various sections thereof and adding sections thereto.” (Voters Pamphlet, Gen. Elec. (Nov. 5, 1974) Text of Proposed Law of Prop. 7, p. 27, italics added; see also Interveners’ RJN at Exh. 9.)

Stats. 1974 (1973-1974 Reg. Sess.) res. ch. 90, pp. 3736-3737, and Voters Pamphlet, Gen. Elec. (Nov. 5, 1974) Text of Proposed Law of Prop. 7, p. 27; see also Interveners' RJN at Exhs. 8 & 9.) The argument that the 1911 initiative-amendment power is subject to the 1974 equal protection clause is exactly backwards.

Implicitly acknowledging this, the municipal petitioners point beyond the 1974 equal protection clause to earlier provisions of the California Constitution and to an alleged general tradition of equality: "There is arguably no aspect of our constitutional democracy more deeply rooted than equal protection of the laws." (CCSF Petn., at p. 20.) They characterize the equal protection clause as a fundamental constituting pillar of the Constitution that cannot be changed except by revision.

This account profoundly misstates California's constitutional history. Indeed, this history flatly contradicts petitioners' rosy portrayal. While the principle of equal protection evolved extra-textually over time, it was not, as petitioners argue, "deeply rooted" and part of the "foundational structure" of the Constitution from its inception. We turn briefly to that history.

Equality of citizenship and rights did not exist in the California Constitution of 1849. Suffrage, for example, was limited to "white male citizen[s]." (1849 Cal. Const. Art. II, §1.) Soon thereafter the Legislature passed patently racist and oppressive legislation, which the courts broadly construed without regard to equal protection norms. Indeed, the very point, sadly, was to deny equality. (See *People v. Hall* (1854) 4 Cal. 399, 404 [extending racial prohibitions to cover the Chinese because to hold otherwise "would admit them to all the equal rights of citizenship," which the Court deemed "an actual and present danger" to the state].)

The 1879 Constitution (still operative today) represented an improvement on some fronts. For example, it included a ban on special

legislation and a privileges and immunities clause. (CCSF Petn., at p. 25.) But – shamefully – it also contained an entire section devoted to the imagined “burdens and evils” of the Chinese which, among other things, gave the Legislature power “to provide the means and mode of their removal from the State.” (1879 Cal. Const. Art. XIX, § 1; see also *id.* §§ 2-4 [other provisions].)

Notably, when this Court began considering the constitutionality of statutes that allegedly discriminated based on race and sex, for instance, it proceeded under the mantle of the Fourteenth Amendment to the United States Constitution. Few hints were offered that the California Constitution had much to say on the matter.⁴ So it was that this Court’s landmark decision in *Perez v. Sharp* (1948) 32 Cal.2d 711, did not cite a single provision of the California Constitution or any California case law in support of its seminal holding. (*Id.* at p. 731.) In like manner, this Court continued to place strong reliance on federal equal protection principles until 1974 when, by amendment, the people at long last enshrined equal protection in the California Constitution. (See, e.g., *Mulkey v. Reitman* (1966) 64 Cal.2d 529, 533 [“Our resolution of the question of constitutionality is confined solely to federal constitutional considerations.”].)

⁴ See, e.g., *People v. Brady* (1870) 40 Cal. 198 [Fourteenth Amendment challenge to statute that prohibited certain races from testifying in court]; *Van Valkenburg v. Brown* (1872) 43 Cal. 43 [fourteenth amendment challenge to law precluding women from voting]; *Los Angeles Inv. Co. v. Gary* (1920) 181 Cal. 680 [fourteenth amendment challenge to deed provision that property could not be sold to a non-Caucasian]; *People v. Hines* (Cal.App. 3 Dist. 1938) 81 P.2d 1048 [fourteenth amendment challenge to conviction where blacks were excluded from jury].

In addition to their mistaken historical narrative, petitioners' description of the nature and purpose of revisions is likewise erroneous. The constitutional requirement that proposed revisions be enacted by two-thirds majority vote of the Legislature had little or nothing to do with counter-majoritarianism. Quite the contrary, the purpose of allowing the Legislature to propose revisions was an effort to make it *easier* to change the Constitution. We briefly elaborate this important point.

The 1849 Constitution provided just two methods of modifying the Constitution: by amendment, proposed by a majority of both houses of the legislature and adopted by the voters, or by revision, which could be adopted only at a constitutional convention. (Grodin et al., *The California State Constitution – A Reference Guide* (1993) at p. 302.) By the mid 1870s, popular reform movements began to coalesce and to demand, among other things, “restrictions on the powers of state legislatures, and government regulation of corporations and monopolies.” (California Constitution Revision Commission, *Constitution Revision History and Perspective* (1996) at p. 4.) The reform-driven desire to instruct and restrict the Legislature and corporations was a hallmark of the Constitutional Convention of 1878-79. (*Id.* at p. 5.) But “most of the reforms so earnestly expounded by the 1879 revisionists went largely ‘unrealized’ after the adoption of the new constitution.” (*Ibid.*) Ultimately, the people sought relief by reserving to themselves the power of initiative and referendum, which was added by amendment to the Constitution in 1911. (1879 Cal. Const., art IV, sec. 1.)

In the decades that followed, as the initiative power was used frequently to amend the Constitution, the size and complexity of the document steadily increased. This led to repeated calls for a new constitutional convention to revise the document. But the convention process was so complex and difficult to undertake that a constitutional

convention never occurred. The Legislature repeatedly proposed constitutional conventions, but voters rejected the notion time and again (1914, 1920, and 1930).⁵ (*Constitution Revision History and Perspective, supra*, at p. 6.) As a consequence, there has been no constitutional convention for well over a century – since 1879. (Grodin et al., *The California State Constitution – A Reference Guide*, at p. 303.) The reform movement was frustrated for decades by the daunting process for revising the Constitution – which, again, could not be proposed by the Legislature but *only* by convening a constitutional convention. (See 1849 Cal. Const., art. X, § 2, amended in 1852, and 1879 Cal. Const., art. XVIII, § 2.)

The change that eventually broke the long-extant logjam for reform was an amendment (notably, not a revision) to the Constitution to make it substantially easier to enact revisions. In 1962, the voters approved a constitutional amendment that “authorized the legislature to act as a constitutional convention, allowing it to submit its own revisions to the electors for ratification.” (*Constitution Revision History and Perspective, supra*, at p. 7, citing Proposition 7 (1962), proposed by Assembly Constitutional Amendment 14, Stats.1961, Res. Ch. 222.)

In sum, the role of the Legislature in proposing constitutional revisions directly to the voters for ratification is of relatively recent vintage. This latter-day reform constituted a significant liberalization of the revision process. Given that the Legislature had no role for the first 113 years of California’s history in deliberating particular constitutional revisions, and that the amendment allowing it to do so was created to make revisions easier (not more difficult), there is little to support petitioners’ argument

⁵ The exception was in 1934 in the midst of the Great Depression, when the question of calling a convention was narrowly approved by voters. However, the Legislature never provided for the convention to be held. (*Constitution Revision History and Perspective, supra*, at 6.)

that the reason for the current revision process is to protect equality or any other rights from measures passed by majority vote. As if more were needed, the 1962 amendment that made revisions easier pre-dated the equal protection clause by more than a decade and had nothing to do with protecting minority rights. And there is no evidence that the people – or anyone – intended that amendment to diminish the people’s reserved power to amend the Constitution by initiative.

III. CASE LAW FROM OTHER JURISDICTIONS IS NOT DISTINGUISHABLE.

Petitioners argue that case law from other jurisdictions upholding initiative amendments defining marriage is distinguishable. (See *Bess v. Ulmer* (Alaska 1999) 985 P.2d 979, 982; *Martinez v. Kulongoski* (Or. 2008) 185 P.3d 498; *Lowe v. Keisling*, (Or. App. 1994) 882 P.2d 911.) Most importantly, they attempt to distinguish *Bess* on two grounds. First, they note that the initiative in *Bess* was passed by a two-thirds majority of each house of the Alaska legislature before being approved by the voters. Second, they note that in Alaska lesbians and gays are not a suspect class. “Thus, the case has little bearing on whether a bare political majority can strip lesbians and gay men of the fundamental right to marry.” (CCSF Petn., at p. 37, fn.3.)

These arguments highlight the profound weakness of petitioners’ position. The manner by which an initiative is proposed and passed plays no part in analyzing whether an initiative is an amendment or revision. The holding in *Bess* is not based on the fact that the amendment was approved by a supermajority in the Legislature before being voted on by the people. It was upheld because “[f]ew sections of the Constitution are directly affected, and nothing in the proposal will ‘necessarily or inevitably alter the basic governmental framework’ of the Constitution.” (*Bess v. Ulmer*,

supra, 985 P.2d at p. 988, quoting *Brosnahan, supra*, 32 Cal.3d at p. 262.)

The revision vs. amendment analysis is indifferent to how an amendment was placed on the ballot, whether by the Legislature or directly by the voters. The issue is whether it amends or revises the Constitution.

Likewise, neither precedent nor a legal basis exists for supposing that the revision vs. amendment analysis is affected by whether the judiciary has declared a group a suspect class. This Court’s consistent teaching is that the revision inquiry turns on the magnitude of the change to the structure of the California Constitution, not on whether a measure adversely affects the rights of a particular group.

CONCLUSION

For the foregoing reasons and those stated in “Intervenors’ Opposition Brief” filed in *Karen L. Strauss et al. v. Mark B. Horton et al.*, case no. S168047, this Court should hold (1) that Proposition 8 is a valid initiative amendment, not a revision, (2) that Proposition 8 does not violate the separation of powers doctrine, and (3) that no marriage other than one between a man and a woman, regardless of when or where performed, is valid or recognized in California.

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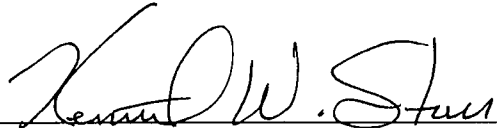
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Dated: December 18, 2008

Respectfully submitted,

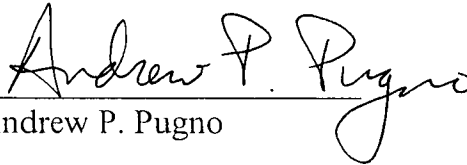
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RULE 8.204(C)(1) CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, counsel for Interveners hereby certifies that this Interveners' Opposition Brief In Response To Second Amended Petition For Writ Of Mandate Of City And County Of San Francisco, et al. is proportionately spaced, has a typeface of 13 points or more, and contains 3,975 words, including footnotes but excluding the Table of Contents, Table of Authorities and Certificate of Compliance, as calculated by using the word count feature in Microsoft Word.


Andrew P. Pugno

Attorney for Interveners

PROOF OF SERVICE

I, Andrew P. Pugno, declare: I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 101 Parkshore Drive, Suite 100, Folsom, CA 95630.

On December 19, 2008, I served the following document(s):

1. **INTERVENERS' OPPOSITION BRIEF IN RESPONSE TO SECOND AMENDED PETITION FOR WRIT OF MANDATE OF CITY AND COUNTY OF SAN FRANCISCO, ET AL.**

on the interested parties in this action, by placing a true copy thereof in sealed envelope(s) addressed as follows:

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I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.
Executed on December 19, 2008, at Folsom, California.



ANDREW P. PUGNO

Service List

For Supreme Court Case No. S168078.

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